

Will "Funny Brief" Backfire at Supreme Court?

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The Cato Institute's Ilya Shapiro has done it again. For the third year in a row, he has filed what he calls one of Cato's "funny briefs" with the U.S. Supreme Court, an *amicus curiae* brief that celebrates, more or less, the objectionable speech at issue in a First Amendment case.

The latest brief weighed in on *Lee v. Tam*, a challenge to the U.S. Patent and Trademark Office decision to deny trademark registration to the Asian-American rock band called The Slants because the name is "disparaging." The case will be argued Jan. 18.

On the front page of the brief filed on Dec. 16, Shapiro identified his clients collectively as "a basket of deplorable people and organizations," and on the next page he tersely reframed the issue in the case this way: "Does the government get to decide what's a slur?"

He proceeded to review the history of disparaging names that "long ago entered our political vocabulary, encapsulating criticisms more succinctly than any polite term ever could." The list includes the Know Nothing Party, the Democratic Party's donkey, and "suffragette"—a word whose diminutive suffix was a put-down of women fighting for the right to vote.

Shapiro even dropped a footnote reminding the justices that "questioning the character of our politicians is such a cherished American tradition that a member of this court recently engaged in it herself." That was a clear reference—he mentioned her by name—to Justice Ruth Bader Ginsburg's description this summer of then-presidential candidate Donald Trump as a "faker," an epithet she later said she regretted.

Reminding a justice of something she would rather forget may not be the best strategy in brief-writing, and the court's guide to advocates warns that "Attempts at humor usually fall flat" in briefs and arguments. Overall the unorthodox style of this brief and his previous two has raised eyebrows among members of the staid Supreme Court bar.

"Sometimes filing an unconventional brief is a way to get noticed," said veteran advocate David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel, and author of two books on appellate advocacy. "Every lawyer who files such a brief has to make a judgment about whether being noticed in an individual case trumps personal credibility. Rarely do repeat players at the court do that, because it takes a long time to build a reputation with the justices."

Asked about Frederick's comment, Shapiro said, "There are risks like that. But we file enough other briefs at the court that Cato is a big enough brand. Our bread and butter is law and legal policy, and our briefs are done in a very rigorous manner."

Shapiro, a senior fellow at the libertarian organization, added that "Nobody has ever complained, nobody has dropped me a line telling me it's going to annoy the court or that it's inappropriate. If it were a problem I think we would have gotten some back-channel [communication] from the court at some point."

As for the brief's Ginsburg reference, Shapiro said, "We certainly thought about that. It wasn't necessarily tweaking her. We all engage in speech from time to time that someone considers disparaging. It seemed topical, a little risky, but a lot of what we do in these briefs is risky."

Shapiro filed similar briefs two other cases. The first was in *Susan B. Anthony List v. Driehaus*, a 2014 case involving an Ohio law that made it a crime to lie about the record of a political candidate during an election campaign. Cato's brief introduced the word "truthiness" to the high court, which struck down the law unanimously.

The next one was filed in the 2015 case *Walker v. Texas Divisions Sons of Confederate Veterans*, arguing against a Texas law that allowed state officials to reject requests for specialty license plates that "might be offensive to any member of the public." Shapiro pointed out that Texas allowed University of Oklahoma specialty plates, even though "any true Texans" would find such a plate to be "beyond the pale of any standard of human decency." By a 5-4 vote the court ruled that Texas could ban plates displaying the Confederate flag.

"I've been trying to develop a style that is more readable," Shapiro said. "It's not a comedy routine. It's a way to effectively move the climate of ideas, in a serious way. At the end of the day, we make our legal points."

And Shapiro acknowledged that the main target audience of amicus briefs is the justices' law clerks, not the justices themselves. "I've gotten word from the clerks over the years that they appreciate Cato briefs in general. It's like telling a story in long-form nonfiction. I do hope that with a brief like this, at least some of the clerks will say to their boss, 'Hey, you might want to check this one out.'"